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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON
Petitioner,

versus

UNITED STATES OF AMERICA
Respondent.

Petition for Certiorari to Review Judgment of Fifth Circuit Court of Appeals in No. 26,976, "Randolph Erwin Rosenson versus United States of America."

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Randolph Erwin Rosenson, prays that a writ of certiorari issue to the United States Court of Appeals for Fifth Circuit to review the judgment, opinion and decree of said Court rendered on October 27, 1969 and as to which rehearing was denied on November 18, 1969.

CITATIONS TO THE OPINION BELOW

The opinion of the District Court is reported in 291 F.S. 874. The Per Curiam opinion of the Fifth Circuit is as yet unreported. Both opinions appear in the Appendices attached hereto.

JURISDICTIONAL STATEMENT

Petitioner was convicted under one count of violation of 18 U.S.C. 1407 relative to failure by one convicted under a

narcotic or marijuana law to register upon leaving or reentering the country and was sentenced to one year imprisonment. A second count was dismissed as being unconstitutional under the doctrine of Marchetti-Grosso-Haynes, as set forth in argument. This conviction was affirmed by the Fifth Circuit in an opinion rendered on October 27, 1969 and rehearing was denied on November 18, 1969.

The statutory provision relied upon as conferring jurisdiction upon this Court is 28 U.S.C. 125 4(1).

QUESTIONS PRESENTED

1. Whether a conviction under the general Louisiana "attempt" statute pertaining to attempts to commit any and all crimes, when related to an attempt to possess marijuana, is a conviction under a "narcotic or marijuana law" of the state of Louisiana?

2. Whether the requirements of 18 U.S.C. 1407, relative to the requirement of registering upon leaving the country, can be deemed valid if the requirement of the same statute, as to registry upon reentry is unconstitutional as violating Fifth Amendment privilegeagainst self-incrimination?

3. Under the rationale of Marchetti-Grosso-Haynes as to the scope of the constitutional privilege against self-incrimination, would registry upon leaving the country, by one convicted of a narcotics violation, constitute evidence or a lead to evidence against him where the trip out of the country was a violation of parole or probation conditions as to travel which would subject him to criminal penalties by the State authorities?

STATUTES INVOLVED

1. Title 18 U.S.C. Sec. 1407

2. LSA-14 R.S.: 27 (The Louisiana general "attempt statute)

The Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

In January of 1965 petitioner, Rosenson, pleaded guilty to "attempted possession" of eleven marijuana cigarettes under the Louisiana general "attempt" statute, LSA-R.S.: 14:27. This statute applies to any attempt to commit any crime under the laws of Louisiana, providing lesser penalties, as hereinafter discussed. This general attempt statute is not even included in the same volume of Louisiana statutes covering narcotics or marijuana offenses, as noted below. As a result of this guilty plea he received a suspended sentence and was placed on probation. His probation officer was one Dee Hammett who covered the area of petitioner's domicile in Mississippi (R. 133,134). The probationery status of petitioner at the time of his failure to register upon leaving the country becomes important as bearing upon the issue of self-incrimination under the rationale of Marchetti-Grosso-Haynes, discussed in argument below.

Petitioner has a thriving business ivnolving the import of birds and animals for pet shops and maintains a petshop and animal compound in Mississippi. (R. 152, 153) He also

He also maintains a home in Florida and travels extensively around the United States in connection with his business and makes frequent trips to Mexico.

It was admitted by the Government that petitioner had, after his state conviction and suspended sentence, served as an informer, assisting state and Federal narcotics agents. (R. 44, 45)

An attempt was made to show that the instant prosecution was initiated when he refused to cooperate as much as desired in the informer role, but his inquiry was cut short by the Court as immaterial. (R. 187, 188)

On December 28, 1965, less than a year after his guilty plea to the "attempted" possession of 11 marijuana cigarettes, petitioner made a plane trip via Pan American Airways to Merida, Mexico, for the purpose of obtaining some birds for a business man in Mississippi, a Mr. Epps. The latter paid all expenses and petitioners attorney, Mr. Yarborough, accompanied him. (R. 154, 155)

Petitioner testified that since he had never been sentenced to any jail term (having received only a suspended sentence) he did not consider himself as having been "convicted" under any marijuana law. Moreover, he testified that he did not see any of the signs at the airport relative to the necessity of registering and was not advised of any sueh necessity upon departing, either by any person in authority or by his Mississippi attorney (R. 160, 161)

On returning to New Orleans he was subjected to a thorough and humiliating search at the airport which

involved a rectal probe. Rosenson testified that he was confused and humiliated during the search and questioning. He did not recall the details of what he told the officials who were questioning him as they peered up his rectal cavity, but did not recall denying any prior conviction for narcotics or marijuana. (R.160, 161)

The search consumed some 20 minutes and no contraband of any kind was found. (R. 121)

Petitioner was tried without a jury and convicted on two counts of violating Title 18 U.S.C. relative to failure to register with Customs officials upon leaving and upon reentering the country. Pending disposal of post-conviction motions, court rendered the far reaching decisions of Marchetti, Haynes and Grosso and the trial Judge, in the light of said decisions, set aside the conviction upon the count based upon failure to register upon returning to the country. He held the statute violated petitioners constitutional rights under Marchetti, Grosso and Haynes, but treated the requirement of failing to register upon leaving as separable and not violative of the rights of petitioner as to self-incrimination. (See Opinion. District Court Appendix).

REASONS FOR GRANTING THE WRIT

1. CONVICTION UNDER THE LOUISIANA GENERAL ATTEMPT STATUTE IS NOT A CONVICTION UNDER "A MARIJUANA OR NARCOTICS LAW" IN CONTEMPLATION OF TITLE 18 U.S.C. 1407.

The Federal statute under which petitioner was prosecuted here, Title 18, U.S.C. 1407, in the pertinent portion, applies only to those:

"***convicted of a violation of any of the narcotic or marijuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year" etc.

The question, therefore, is whether or not conviction under the Louisiana general attempt statute, applicable to all manner of crimes, constitutes a "conviction" contemplated by the above Federal statute.

In disposing of this point in the post trial motions the Court relied heavily upon the general language found in ADAMS V. UNITED STATES, 299 F. 2d 327 (9th Cir. 1962). In so doing, however, he overlooked the factors considered in Elater 1963 decision by the same Court in HASEROT V. UNITED STATES, 9th Cir. 321 F. 2d 582.

In the Haserot case the Ninth Circuit was called upon to decide whether or not a certain California statute was "a narcotic or marijuana law" within the meaning of the instant Federal Statute. In holding that the California Statute did fall within the scope of the instant Federal registration statute the Court considered the following factors:

(a) That the state act was found in the California Health and Safety Code under Division X, entitled "Narcotics" and under another chapter entitled "Illegal Narcotics".

(b) It was listed among the prior narcotics offenses precluding probation in the event of subsequent conviction;

(c) It carried an increased potential punishment for a second offense.

None of the above factors will be found quo ad the Louisiana general attempt statute. First of all, it is found in an entirely different volume from the narcotics statute, being listed as R.S. 14:27 under the title "Inchoate offenses". It covers attempts to commit any crime of any nature.

The penalty for attempts is substantially less than that provided for the actual offense. In one category the penalty is set at half the penalty provided for the completed offense itself.

In rejecting the argument of the defendant on this point the trial Judge noted two Louisiana cases holding that a verdict of attempted possession of marijuana was responsive to a charge of possession of marijuana. It is submitted, however, that this test of responsiveness is not a fair test as to the general connotation of a term describing a category of crimes.

The responsiveness of verdicts is a rather arbitrary matter, regulated in Louisiana solely by statute, Article 814 of the Code of Criminal Procedure. For example, under the crime of "theft" we find that one of the responsive verdicts is "Guilty" of unauthorized use of movables". This crime is committed where there is no intention to keep the object of the theft. But, one using the term "theft" in a general

statute would scarcely be deemed to have contemplated an offense which did not connote a "keeping".

Significantly, the terms of the Louisiana attempt statute is so broad that the fulfillment of its requirements (as applied to an "attempt" to possess marijuana) might bear little resemblance to the substantive offense of possessing marijuana. For the statute (R.S. 14:27) provides in its opening paragraph the definition of an "attempt" in the following language: (See Appendix C)

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended etc. (Emphasis added)

Under the above broad definition of an attempt, a man who simply made a phone call in an effort to locate a "pusher" who might supply him would clearly be performing an act" tending directly toward the accomplishing of his object". Yet it seems extremely doubtful that Congress intended that such a man (though he changed his mind and never pursued the eleven marijuana cigarettes past the first phone call wherein he sought to locate a pusher through an intermediary) would be required to register as a narcotics offender when leaving or reentering the country.

2. THE REGISTRATION STATUTE, TITLE 18 U.S.C. 1407 IS INDIVISIBLE.

The Fifth Circuit adopted the opinion of the trial Judge in its Per Curiam (see Appendix). We must therefore look to

the opinion of the trial Judge for the rationale upon which this decision stands.

As will appear by the opinion of Judge Heebe (Appendix) he applied the rationale of the recent "self incrimination trilogy", Marchetti, Grosso and Haynes, to the count involving failure to register upon reentering the country and found the statute unconstitutional quo ad failure to so register. He refused to do so, however, as to that portion of the statute affecting failure to register upon leaving the country.

We submit that this was not consistent with the rationale of this Court in HAYNES V. UNITED STATES, 390 U.S. 85, 19 L. ed 2d 923, 88 S. Ct. 722, wherein Your Honors, dealing with a comparable situation involving the registration of firearms, declared: (at page 932 of 19 L. ed 2d)

"Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution."

Applied to the instant situation it can certainly be said that registry upon leaving the country would "substantially increase the likelihood" of prosecution for failure to register upon return. For, although there was nothing furtive about the trip (because petitioner and his attorney admittedly possessed tickets in their right names and flew on a regularly scheduled commercial airline) the registry as a convicted marijuana offender upon leaving would serve a double purpose in a prosecution for failure to register upon reentry because:

convicted marijuana offender upon leaving would serve a double purpose in a prosecution for failure to register upon reentry because:

(a) It would amount to a formal admission of status, i.e. a formal admission that petitioner had been convicted under "a marijuana law" (a point extremely dubious as noted above) and (b) Such registration would alert the customs officials so as to enable them to lie in wait for petitioner upon his return.

Certainly, this latter aspect forms a "link" in the evidentiary chain within the rationale of Marchetti-Grosso and Haynes.

Finally, in conclusion upon this point, it is difficult to see how a portion of Title 18 1408 can be invalidated in part as being unconstitutional while sustaining so closely related a portion as we have here.

The requirements as to registry upon leaving and returning are both contained in the same paragraph, i.e. 1407 (a). THE CERTIFICATE TO BE OBTAINED UPON LEAVING IS THE SAME CERTIFICATE TO BE SURRENDERED UPON RETURNING. The whole scheme of registration is part of the same "package". We submit, therefore that any Solomon-like surgery, such as that attempted by the trial Judge in an effort to rationalize his cutting of the infant in half, must fail for lack of logical oxygen. This baby is doomed, unless this Court will tolerate a new race of two-headed semantic monstrosities in the family of statutes.

3. REGISTRATION AS SELF-INCRIMINATION QUO AD PAROLE OR PROBATION VIOLATION.

At the trial of this case in the District Court it was urged that, in addition to the other aspects of self-incrimination noted above, registration by petitioner upon leaving for Mexico would have incriminated him by reason of his probationary status in Mississippi. This probationary status is described at several points in the record, as we will show.

The trial Judge, however, in disposing of this aspect of alleged threatened self-incrimination, had this to say: (See 291 F.S. 877 and Appendix A)

"On oral argument counsel for the defendant made some comments about the possibility of a parole violation in leaving the country but this argument was not developed and his comments were vague and general. It was not established by argument or evidence that the defendant violated the conditions of his parole in leaving the country, and we do not deem it necessary to pass upon such a "willof-the-wisp."

It will be noted that, although the Court refers to the argument as a "will-of-the-wisp", he expressly refrains from making a specific finding of fact either as to: (a) The terms of the parole under which petitioner was operating; or (b) Whether going to Mexico was an actual violation.

The trial Judge, in a rather oblique fashion, states that:

"***we do not deem it necessary to pass upon such a will-of-the-wisp."

There is no room whatever to treat the evidence as to parole violation as vague. It was not extensive but was wholly uncontradicted. Thus, Mr. Dee Hammett, a defense witness, testified: (R. 133)

BY MR. GILL: Mr. Hammett, what is your official position with the State of Mississippi?

A. I am a Mississippi Probation and Parole Officer.

Q. Did you have charge and under your control the case of Randy Rosenson as of January, 1965.

A. Yes.

The Government itself established that Rosenson was not supposed to leave the country because of his parole conditions. Thus the Government asked the same parole officer, Dee Hammett, the following: (R. 136)

BY MR. CONNICK: Mr. Hammett, you said that Rosenson spoke to you about traveling from state to state, is that it?

A. And the reason, -- can I explain it to you?

Q. Well, of course, but first of all, did he talk to you about going from state to state?

A. That is correct, yes.

Q. But he did not ever tell you that he wanted to go to Mexico?

A. He did not."

The foregoing testimony by petitioner's parole officer, we submit, which is absolutely uncontradicted, rather clearly establishes that the terms of petitioner's parole or probation did not permit his leaving the country. Moreover, said testimony makes it equally clear that petitioner never obtained leave to depart from the country.

From this, it follows that, no matter how brief the above argument may be it cannot be brushed aside as a mere "will-of-the-wisp". For, if it was a violation of his State parole or probation terms for petitioner to leave the country, the filing of a certificate upon leaving certainly formed part of the chain of evidence against him quo ad violation of parole conditions.

As to the issue of self-incrimination, it can make no difference under the rationale of Marchetti, Grosso and Haynes that the incrimination related to a State offense rather than a Federal one.

Nor is it any answer to contend that the mere filing of the registration certificate does not indicate of itself commission of the crime of parole violation. The filing of the certificate would itself form a link in the evidentiary chain as contemplated in the earlier case of ALBERTSON V. SACB, 382 U.S. 70, 79, 15 L. Ed 2d 165, 172, 86 S. Ct. 194, where the court stated that "response to any of the forms questions in context might involve petitioner in the admission of a crucial element of a crime."

CONCLUSION

It is respectfully submitted that any one of the foregoing three issues warrants the issuance of certiorari in this case.

Wherefore, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit in the above case.

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CERTIFICATE OF SERVICE

I, Geo. M. Leppert, of counsel for petitioner and a member in good standing of the bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing petition for certiorari has been served upon the Solicitor General of the United States and upon the United States Attorney for the Eastern District of Louisiana, by mailing same, postage prepaid and properly addressed on Dec. , 1969.

Dec. , 1969

Geo. M. Leppert

APPENDIX A—OPINION OF

DISTRICT COURT

Heebe, District Judge:

The fear expressed by Chief Justice Warren in his dissenting opinion in Grosso v. United States, 390 U.S. 62 (1968) at 84, 88 S. Ct. 709, 19 L.Ed. 2d 906 is now a reality, although possibly in a different posture, for we are here asked to upset a conviction on all three counts in an indictment charging the defendant with violating 18 U.S.C. Sec. 1407. The defendant is a citizen of the United States and was convicted of attempted possession of narcotics under La. Stat. Ann. 14:27 (40:962), the penalty for which is imprisonment for more than one year. Count I of the indictment charged the defendant with departing from the United States through New Orleans, a port of departure, without registering with a Customs official. Count II charged the defendant with failing upon reentry to surrender the certificate required to be obtained when leaving the United States. The defendant was tried by the Court without a jury on July 20, 1967, and was found guilty on all three counts on October 11, 1967. Prior to sentencing, which was continued several times, the United States Supreme Court rendered its opinion in Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968). Grosso v. United States, supra; and Haynes v. United States, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968). On the basis of these decisions the defendant filed a "Motion in Arrest of Judgment" and a "Motion for New Trial," both on the ground that the privilege against self-incrimination affords

a complete defense to these charges. An alternative ground for both motions was that attempted possession of narcotics is not one of the narcotic or marijuana laws of the State of Louisiana. The United States objected on the ground that the motions were not timely filed. We dispensed with this objection in a former opinion in which we held that the constitutional argument was a "nonwaivable" defense within the meaning of F.R. Crim. P. 12(b)(1) and that, under the circumstances, it was procedurally proper to raise it at that time under F.R. Crim. P. 12(b)(3). The alternative argument was treated as a claim that the indictment fails to state an offense which was properly raised at that time under F.R. F.R.Crim.P. 12(b)(2). United States v. Rosenson, 291

[1] Turning first to the constitutional argument, we now hold that the rationale of *Marchetti, Grosso,* and *Haynes* require us to vacate the conviction on Counts II and III and to dismiss those counts. The same real and substantial hazards of self-incrimination which existed in those cases are manifest in the circumstances of this case. In order to comply with the provisions requiring registration and surrender of the certificate upon reentry, the defendant, in effect, would be admitting that he had violated the law upon departure must be surrender. 19 C.F.R. Sec. 23.9a. If he is unable to surrender the certificate for any reason, he may still register upon reentry under an alternative procedure, but we do not believe that this eliminates, or even lessens, the hazard of self-incrimination because here, as in *Marchetti, Grosso,* and *Haynes,* the statutory obligations are directed exclusively to individuals inherently suspect of criminal activities. This is obvious from the fact that the statute applies only to those persons who have been previously

convicted of a narcotics or marijuana violation. Thus, when a person attempts to register upon reentry without having the certificate required to be obtained upon departure, this must surely wave the incriminating red flag of guilt in the face of the prosecuting officials. This is true in spite of the fact that it is possible that such a person did comply with the requirements of the law upon departure for such instances, as in *Haynes*, must be deemed "uncommon."

[2] With respect to Count I, however, the record does not support a finding that the registration requirements upon departure created a real and substantial hazard of self-incrimination. The reason for this is not that such a person is not inherently suspect of criminal activities at that time, but because the record before us fails to reflect, not only that there is *any* possibility that merely by registering with the Customs officials the defendant opens himself to a criminal prosecution. The defendant has completely failed to show how, by registering upon departure, he renders himself more susceptible to a criminal prosecution and conviction. Nor is it clear from the face of Count I that registration is an admission of guilt as it is from the face of Counts II and III. On oral argument counsel for the defendant made some comments about the possibility of a parole violation in leaving the country but this argument was not developed and his comments were vague and general. It was not established by argument or evidence that the defendant violated the conditions of his parole in leaving the country, and we do not deem it necessary to pass upon such a "will-of-the-wisp."

[3] In our former opinion in this matter, United States v. Rosenson, supra, we did not hold, as contended by the

defendant, that *Marchetti, Grosso* and *Haynes* applied retroactively to this prosecution. We merely held that procedurally it was a proper time to *raise* the argument and left for decision at this time the substantive question of whether the rationale of those cases could be applied retroactively to this case. In light of the opinions which have been rendered subsequent to the Supreme Court decisions, there is no doubt that the principles announced in those cases are applicable to persons tried and convicted prior thereto, even though the privilege against self-incrimination was not asserted at the time of the trial. United States v. Manfredonia, 391 F. 2d 229 (2d Cir. 1968); Greenwood v. United States, 392 F. 2d 558 (4th Cir. 1968); United States v. Lookretis, 398 F. 2d 64 (7th Cir. 1968); Harris v. United States, 393 F. 2d 342 (8th Cir. 1968); Isaac v. United States, 293 F. Supp. 1096 (D.S.C. 1968). This was made clear by *Grosso* in which the defendant failed to argue, even in the Supreme Court, that the privilege against self-incrimination was a defense to the charges against him of willful failure to pay the special occupational tax imposed by 26 U.S.C. Sec. 4411. Yet the conviction on these charges was also reversed.

[4–8] There remains for consideration only the fact that the defendant took the stand and testified in this case. We must decide whether this fact constituted a waiver and therefore put the defendant outside the protection of the privilege. Notwithstanding Leary v. United States, 392 F. 2d 220 (5th Cir. 1968), we hold that this did not constitute a knowing and intelligent waiver of the privilege against self-incrimination. Our reasoning is simple. Ordinarily the failure to assert this as a defense at the trial would constitute a waiver of that constitutional right. Likewise, the fact that

the defendant testified as to the facts of all three offenses would ordinarily constitute a waiver of that constitutional right. However, the cases cited above hold, and we also hold that the failure to assert it as a defense at the trial is not a waiver because neither the defendant nor his attorneys are required to anticipate rulings of the Supreme Court which upset well-entrenched rules, and therefore it does not satisfy the requirement established by Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), and its progeny that to waive a constitutional right, the defendant must *knowingly* and intelligently waive that right. Unless the defendant is fully aware of a constitutional right, he cannot effectively waive that right. Thus, the failure to assert the privilege against self-incrimination by way of defense at the time of the trial does not constitute a waiver of that constitutional right because the right was unknown. The only difference between the failure to assert the privilege as a defense and the fact that the defendant testified is that the latter involves affirmative action on the part of the defendant while the former involves passive omission to act. This difference, however, does not and cannot alter the requirement that to waive a constitutional right the defendant must be fully aware of that right. Consequently, the fact that the defendant testified at his trial is no more a waiver of the privilege against self-incrimination than when he failed to assert it as a defense. We do not read the *per curiam* opinion in *Leary* as being contrary to our decision for in that case, in spite of some of the language contained therein, the Fifth Circuit apparently held that the reasoning of *Marchetti*, *Grosso*, and *Haynes* was not applicable to the facts of that case because the statute in *Leary*, unlike the statute in this case, did not clearly require an admission of guilt.

[9] While the motion before us is not to be considered as a motion for a new trial, we note that under the proper circumstances a new trial is a possible result. In this case, however, we do not feel that a new trial is warranted or would serve any useful purpose. This case was tried by the Court without a jury. The issues were simple, and the evidence thereon in no way prejudiced the trial of the de- evidence was clear and direct. The presence of Counts II and III and the introduction of evidence thereon in no way prejudiced the trial of the defendant as Count I. Consequently, the dismissal of Counts II and III and the convictions thereon is, under the circumstances, all the relief to which the defendant is entitled.

[10] We now turn to the alternative argument advanced by the defendant that attempted possession of narcotics is not one of the narcotic or marijuana laws of the State of Louisiana and that therefore the indictment fails to state an offense. The defendant premises his argument on the fact that Louisiana has adopted the Uniform Narcotic Drug Act which is embodied in La.Stat. Ann. 40:961—40:984 and that he was not convicted of a violation of that Act, which does not make attempted possession of narcotics a crime, but rather was convicted under the general criminal statute, La.Stat.Ann. 14:27, which makes it a crime to attempt to commit a crime. fail for it would require us to engraft subtle distinctions upon the law unwarranted by the clear language of 18 U.S.C. Sec. 1407; Adams v. United States, 299 F. 2d 327 (9th Cir. 1962). Therefore, the fact that the attempt provision is found in a different part of the statute books has no relevance. The relevant inquire is not to determine where the crime is found in the books but rather to determine what the

crime is. Here the crime of which the defendant was convicted is attempted possession of narcotics. That should answer the question.

While we think the matter is free from complexity and is as simple as stated above, we will go further and meet the defendant's argument hear on. The crux of defendant's argument is that all of the narcotic and marijuana laws of the State of Louisiana are found in La. Stat. Ann. 40:961—40:984. It is true that these provisions do not make attempted possession of narcotics a crime. However, without the crime of possession of narcotics there could be no crime of attempted possession of narcotics. Therefore, to the extent that La. Stat. Ann. 14:27 makes attempted possession of narcotics a crime, we believe that it must be considered part and parcel with the provisions of the Uniform Narcotic Drug Act and, as such, one of the narcotic laws of Louisiana. Our conclusion that the crime of attempted possession of narcotics cannot be segregated from the "narcotic laws" of Louisiana and classified as some sort of general offense is buttressed by the fact that an attempt is but a lesser grade of the intended crime, La. Stat. Ann. 14:27, and by the fact that attempted possession of narcotics in Louisiana and in other jurisdictions which have adopted the Uniform Act. State v. Johnson, 228 La. 317, 82 So. 2d 24 (1955); State v. Broadnax, 216 La. 1003, 45 So. 2d 604 (1950); Simpson v. United States, 195 F. 2d 721, 13 Alaska 635 (9th Cir. 1952). Finally, we note that our conclusion accords with the avowed purpose of Congress "to facilitate more effective control of the international traffic in narcotic drugs, and to prevent the spread of drug addiction" in enacting 18 U.S.C. Sec. 1407.

In accordance with the foregoing opinion, it is the order of the Court that the convictions on Counts II and III be, and hereby are, vacated, annulled and set aside. It is the further order of the Court that Counts II and III be, and hereby are, dismissed. It is the further order of the Court that the defendant's motion to dismiss or "Motion in Arrest of Judgment" and "Motion for a New Trial" with respect to Count I be, and hereby is, denied. It is the further order of the Court that sentencing on Count I be, and hereby is, set for October 16, 1968, at 2:00 p.m.

APPENDIX B—OPINION OF FIFTH CIRCUIT COURT OF APPEALS

Before BROWN, Chief Judge, JONES and CARSWELL, Circuit Judges:

PER CURIAM: Randolph Erwin Rosenson was convicted of an unlawful departure from the United States in violation of 18 U.S.C.A. Sec. 1407. The circumstances giving rise to his conviction and the contentions made by him in the district court and in this Court on appeal are set forth in the opinions of the district court, **Rosenson v. United States of America,** 291 F. Supp. 874. No prejudicial error is disclosed by the record before us on appeal. The judgment and sentence of the district court is

AFFIRMED.

APPENDIX C—OPINION OF THE UNITED STATES COURT OF APPEAL

Before BROWN, Chief Judge, JONES and CARSWELL, Curcuit Judges

JUDGMENT: This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, AFFIRMED.

PER CURIAM: It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and is hereby DENIED.